TRACTORS MALAYSIA (1982) SDN BHD

v.

CHIEW CHONG HUAT & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RICHARD MALANJUM J
[CIVIL SUIT NO: K 777 OF 1986]
12 MARCH 1999

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Judgments and orders which are irregular or a nullity - Delay in application to set aside - Whether reasons for delay must be given even if judgment or order defective - Whether party seeking to set aside cannot be blamed for delay if other party does not apply to rectify defective judgment - When ought setting aside be applied for - Whether discretion to extend time to apply for setting aside ought to be strictly exercised - Rules of the High Court 1980, O. 42 r. 13*

This was an appeal against the senior assistant registrar's refusal to extend time for the first defendant to apply to set aside an order and judgment entered against him. The plaintiffs, pursuant to O. 14 Rules of the High Court 1980 ('the RHC'), successfully obtained an order and judgment against the defendants. It was in evidence that the summons-in-chambers in respect of the said O. 14 application was not served on the former solicitors for the first defendant and thus the first defendant was absent during the hearing. On account of this, the first defendant contended that the failure to give him any notice of the said hearing rendered the judgment and order granted against him a nullity and thus can be set aside *ex debito justitiae*. Although the application to set aside the judgment and order was delayed by some 15 months, the first defendant asserted that the effect of a nullity is such that it is not even necessary for the delay to be explained. In any event, the first defendant's affidavits seemingly explained that he should not be blamed for the delay as the plaintiffs did not make the first move to rectify the judgment and order. The plaintiffs, on the other hand, argued that the first defendant's application should not be entertained as there was no explanation for the long delay. Further, they relied on O. 42 r. 13 of the RHC which specifies that an application to set aside a judgment must be made within 30 days from the date of service of the judgment.

Held:

[1] The exercise of judicial discretion should be strict when there is a delay in setting aside an irregular judgment or order.

[2] Even in an *ex debito justitiae* situation, an indolent litigant is still required to give an explanation for the delay.

[3] Order 42 r. 13 of the RHC clearly states that it is "the party intending to set aside or vary such order or judgment [who] must make his application to the court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him." Hence the first defendant's explanation that he should not be blamed for the delay since the plaintiffs did not make the first move to rectify the defective judgment and order is without merit and not reasonable in the circumstances.

[Appeal dismissed.]

Cases referred to:

Harkness v. Bell's Asbestos & Engineering Ltd [1967] 2 QB 729 ***(cit)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(foll)***

Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(aff)***

Tan Ewe Chong & Ors v. Pribudi Sdn Bhd & Ors [1997] 3 CLJ Supp 372 ***(cit)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 42 r. 13, O. 14

For the 1st defendant/appellant - Irene Liew; M/s PK Lim & Co
For the plaintiffs/respondents - Kenneth Chong; M/s Chin Lau Wong & Foo

Reported by S Dharmendran

JUDGMENT

Richard Malanum J:

The Appeal

This is an appeal against the decision of the senior assistant registrar (SAR) dismissing the application of the appellant/1st defendant for an extension of time to apply to set aside an order and judgment entered against him in Suit No. K 777 of 1986. Although this is an appeal, the approach to be taken is that it is by way of rehearing (see: *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716; [1994] 2 MLJ 97).

The order and judgment were obtained on 28 September 1995 (the said judgment) on the application by the respondents/plaintiffs under O. 14 of the Rules of the High Court 1980 (RHC). The initial hearing of the application was fixed on 24 August 1987. It was subsequently rescheduled to 28 September 1995. There is nothing to show that in both the hearings the

appellant/1st defendant was present or represented. It was also not in dispute that the former solicitors for the appellant/1st defendant, Messrs Rayner & Co., had ceased to exist upon the demise of its proprietor. And there is no contest that the attempt to serve the summons-in-chambers in respect of the O. 14 application on the said legal firm failed. Despite such failure the hearing of the application proceeded and the said judgment was granted.

The next stage of the episode was the service of the said judgment on the appellant/1st defendant on 20 December 1995. With a covering letter on even date ("CMN-1") issued by the solicitors for the respondents/plaintiffs the said judgment was enclosed. The covering letter reads, *inter alia*,:

> We refer to your letter dated 13th instant and extend herewith a sealed copy of the Judgment for your attention. We shall appreciate for your early payment of the same to avoid execution of the Judgment being taken against you.

In turn the appellant/1st defendant replied stating, *inter alia*, and shorn of the formalities ("CMN-1"):

> Your letter dated 20.12.1995 in respect of the above refers.
>
> For your information, I have the intentions to settle the amount claimed by your client. Before that, I would be most grateful if your client could inform me the followings:-
>
> 1. Where is the D8K machinery at present?
> 2. If it has been sold and/or auctioned, how much was the price?
> 3. If your client agrees, I would like to have a replacement of the said machinery, be it a brand new D8K or a stone Breaker or if it has not been sold and/or auctioned, I request the said D8K be returned to me.
> 4. I agree to pay the difference of the amount between the sold and/or auctioned D8K and the replacement that your client intends to give to me.
> 5. Kindly also let your client quote to me the replacement of the machinery.
>
> Looking forward to receiving your early reply soonest, if possible on or before the 15.01.1996.
>
> Thank you.
>
> Yours faithfully,
>
> Signed
> (Chiew Chong Huat)

These two documents have been duly exhibited in the affidavit of Chong Min Nget affirmed on 29 April 1997 and filed in opposing the present application of the appellant/1st defendant. It is also not in issue that the respondents/ plaintiffs carried out execution proceeding against the appellant/1st defendant that was objected to by the latter.

About 15 months after the service of the said judgment the appellant/1st defendant filed the present application seeking for the following orders, namely:

(1) an Order that the Plaintiffs' Order and Judgment both dated the 28th day of September 1995 be unconditionally set aside and that the Plaintiffs' order 14 Application be restored for hearing; or

(2) alternatively, for an Order that the Plaintiffs' Order and Judgment both dated the 28th day of September 1995 be varied to the effect that:-

(a) the adjudged expenses (including legal fees and expenses) incurred by the Plaintiffs without providing for taxation be deleted from both the Order and the Judgment;

(b) the adjudged statutory interest at the rate of 8% per annum from the date of judgment to the date of full payment be deleted from both the Order and the Judgment, and

(c) the Plaintiffs' costs be taxed.

(3) an Order that all execution proceedings based on the Order and Judgment both dated the 28th day of September 1995 taken by the Plaintiffs under Application For Execution No. K36-08-96 against the 1st Defendant and now pending before this Honourable Court be unconditionally set aside or alternatively, stayed upon such terms as this Honourable Court may impose.

(4) an Order that the 1st Defendant be granted an extension of time until the 17th day of April 1997 in which to file this application for setting aside or to vary the Plaintiffs' Order and Judgment both dated the 28th day of September 1995; and

(5) an Order that the costs of this application be borne by the Plaintiffs.

As the application for extension of time was dismissed, the learned SAR did not find it necessary to consider the other orders sought for. Hence this appeal.

The Contentions

Basically it is the contention of the appellant/1st defendant that extension of time should be given as the said judgment is a nullity and thus qualified to be set aside *ex debito justitiae.* Such a reason is founded on the fact that the appellant/1st defendant was absent during the hearing of the O. 14 application.

According to learned counsel for the appellant/1st defendant the effect of a nullity is such that it is not even necessary for her client to explain for the delay in making the present application.

The other points raised are that there are merits to the proposed defence and that the said judgment is bad in law as the amount claimed is more than the sum outstanding.

For the respondents/plaintiffs it was argued that the application should not be entertained as there was no explanation for the long delay. Learned counsel relied on the new provision of O. 42 r. 13 of the RHC. That provision sets the time limit to 30 days from the date of service of a judgment to apply to set it aside.

It was also submitted that there was no merit in the proposed defence and that the appellant/1st defendant had waived his right to set aside the said judgment due to the response he gave and his challenge to the execution proceeding.

The Law

Perhaps it is appropriate to set down the provision in the RHC as regards the setting aside of a judgment. It reads: O. 42 r. 13:

> 13. Setting aside or varying judgments and orders. (O. 42 r. 13)
> [Ins P.U. (A) 192/93]
>
> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment **within thirty days after the receipt of the order or judgment by him**. (emphasis added).

And under O. 14 r. 11 of the RHC it is clear on the right of an absent party as regards setting aside judgment. It provides:

> 11. Setting aside judgment. (O. 14 r. 11)
>
> Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the Court on such terms as it thinks just.

Learned counsel for the appellant/1st defendant cited several cases in support of her argument. They are, *inter alia*, *Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd & Anor* [1996] 1 MLJ 374; *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 and *Harkness v. Bell's Asbestos & Engineering Ltd.* [1967] 2 QB 729.

In *Muniandy's* case this is what his Lordship Edgar Joseph Jr. FCJ said on the effect of non-service, at pp. 381-382:

> In my view, even if counsel for the chargees were correct in his description of the nature of the reliefs prayed for by the chargees in their originating summons – though, in point of fact, he was not – this would not have relieved the chargees of their duty to serve notice of the adjourned hearing of the originating summons on the chargors because I consider that O. 83 r. 2(4) has a common law content. In other words, in my view, O. 83 r. 2(4) is merely a statutory enunciation of the fundamental rule of natural justice as expressed in the Latin maxim *audi alteram partem* (hear the other side) so that the obligation to serve notice of the adjourned hearing of the originating summons remained even if O. 83 r. 2(4) did not apply. It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem.*

Further down his Lordship continued, at p. 383:

> In my view, the effect of failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the *ex parte* orders obtained, in consequence, a nullity.

And on the issue of delay this is how his Lordship put it, at p. 384:

> In my view, lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. (See *Atwood v. Chichester* [1878] 3 QBD 722). I am further supported in this by the following passage in a very recent judgment of the Federal Court in *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p. 42:
>
> > … it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:
> >
> > (a) no one has suffered prejudice by reason of the defendant's delay.
> >
> > (b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or
> >
> > (c) to let the judgment stand would constitute oppression. (See *Atwood v. Chichester* [1878] 3 QBD 722; *Harley v. Samson* [1914] 30 TLRL 450.
>
> We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time if the particular circumstances of the case require the intervention of the court. (See *Beale v. Mac Gregor* [1886] 2 TLR 311).

On the question of waiver his Lordship was clear when he said this, at p. 385:

> In my view, there can be no waiver in the absence of an intention to waive. Here, the chargors were ignorant laypersons, who were unrepresented and obviously knew nothing about their legal rights. In the words of Lord Chelmsford LC in *Darnley (Earl of) v. Proprietors of London, Chatham and Dover Rly* [1867] LR 2 HL 43 at p. 57, 'A waiver must be an intentional act with knowledge'. In these circumstances, the chargors' acceptance of the money could not be construed as an intention to waive those rights. In any event, in my view, an order which is a nullity is incapable of being waived. Their summons in chambers was, therefore, not barred by waiver.

In an earlier case of *Tuan Hj. Ahmed (supra)* it was also his Lordship Edgar Joseph Jr. who, at p. 36, said this:

> It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.
>
> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that, it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O. 2 r. 2(i) of the Rules of the High Court 1980.)

And further down he went to say this, at p. 42:

> But the further hurdle which confronted the appellant and which he had to surmount was that there had been a spectacular delay of some three years before he bestirred himself into applying to the High Court to set aside the default judgment though admittedly, he had not taken any fresh step after becoming aware of the irregularity.
>
> **Nevertheless, it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:**
>
> (a) **no one has suffered prejudice by reason of the defendant's delay;**
>
> (b) **alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or**
>
> (c) **to let the judgment to stand would constitute oppression.** (See *Atwood v. Chichester* [1878] 3 QBD 722; *Harley v. Samson* [1914] 30 TLR 450.)

> We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time, if the particular circumstances of the case require the intervention of the court. (See *Beale v. Mc Gregor* [1886] 2 TLR 311.)
>
> By way of explanation for his delay in making his application to set aside the default judgment, the appellant had put forward the improbable explanation, which the judge had no hesitation in dismissing as 'ludicrous', that he had allowed judgment in default to go against him because he could not afford to engage solicitors. Having regard to his business status and experience, we agreed with the judge that this was a 'ludicrous' explanation, and was therefore unacceptable. But, delay alone, having regard to the circumstances of the present case, was not necessarily fatal to the appellant's case.
>
> In our view, having regard to the principles enunciated above, on when the court can condone delay on the part of a defendant, the tardiness or the laches of the appellant in making his application, to set aside the default judgment, was not fatal to his application, especially since, in our view, the default judgment was by reason of uncertainty, a nullity, and the amendment made by the judge to it by deleting the words 'on monthly rests', did not cure that defect. (emphasis added).

From these two cases which are decisions of the apex court of this country it appears that delay is not fatal in a case where a judgment obtained is irregular as to amount to a nullity. But learned counsel for the respondents/plaintiffs argued that these cases should be distinguished from the present one as they were decided without due consideration to O. 42 r. 13 of the RHC. In fact his Lordship Edgar Joseph Jr. in *Tuan Haji Ahmed's* case *(supra)* spelled out that point when he said this, at p. 43:

> For the avoidance of doubt, we would add, that having regard to the chronology of events hereinbefore mentioned, the issue of delay in the present case has been determined without regard to O. 42 r. 13, which came into force only on 1 August 1993, by virtue of PU(A) 192/93, and which provides:
>
> > Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

Anyway, aside from the two cases cited above it seems to me that the exercise of judicial discretion should be strict when there is a delay in setting aside an irregular judgment or order. In the case of *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 his Lordship Gopal Sri Ram JCA when delivering judgment for the Court of Appeal dwelt on the point of delay and said this (at p. 229):

The delay point

It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt,* though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae,* a court may refuse relief to an indolent litigant.

In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.

The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30. It is a decision of the Federal Court and therefore quite plainly binds this court. There, Edgar Joseph Jr FCJ, said (at p. 36):

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae,* that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O. 2 r. 2(i) of the Rules of the High Court, 1980.) (emphasis added).

The foregoing case was also an application to set aside a judgment that was irregularly obtained. The Court of Appeal dismissed the appeal against the refusal of the lower court to set aside the impugned judgment. Hence, even in an *ex debito justitiae* situation an indolent litigant is still required to give an explanation for the delay (see also: *Tan Ewe Chong & Ors v. Pribudi Sdn. Bhd. & Ors* [1997] 3 CLJ Supp 372; [1998] 5 MLJ 108).

The Explanation Of The Appellant/1st Defendant

From the affidavits filed by the appellant/1st defendant I find no clear explanation given for the delay of about 15 months before making the application to set aside the said judgment. This was how the point of delay taken in the corrective/affidavit in reply of the appellant/1st defendant sworn to on 13 May 1997 in paras 8 and 9 thereof:

8. In reply to paragraph 5 of the Plaintiff's Affidavit on the issue of delay, I am advised by my said Counsel and verily believe that delay should not be made an issue as lapse of time is not a bar to my application to set aside the said Order and Judgment which are a nullity based specifically on the reasons deposed by me in paragraphs 4 and 5 of my said Affidavit which are of such fundamental importance. I further say that the depositions on the part of the Plaintiffs as deposed to in paragraphs 12 and 13 of the Plaintiffs' Affidavit certainly shows that the Registrar had not only seriously erred but that I was being denied natural justice to be informed of the hearing which was, I repeat, of such fundamental importance as to render the said Order and Judgment obtained on an *ex parte* basis a nullity in law.

9. In reply to the rest of paragraph 5 of the Plaintiffs' Affidavit on the issue that I did not address the reasons for the delay, I maintain that I had done so by giving the reasons in paragraphs 14,15 and 16 of my said Affidavit which constitutes sufficient and cogent reasons in law to justify the delay, if any.

And the affidavit referred thereto is the affidavit in support of the appellant/1st defendant sworn to on 17 April 1997. The paragraphs mentioned therein read:

…

…

4. I verily believe that when both the said Order and Judgment were entered against me as the 1st Defendant on 28.09.1995 pursuant to the Plaintiffs' Order 14 Rule 1 Summons in Chambers dated 30.07.1987, I was not given any notice of the said hearing on 28.09.1995. Alternatively, I had not received any notice of such hearing. Unless the Plaintiffs or the High Court Registry can prove that my former Solicitors, Messrs Rayner & Co. or I had been served with the notice of hearing, I verily believe that the said order and Judgment were improperly obtained against me. In the absence of such proof, I am advised by my Counsel, P.K. Lim Esq. and verily believe that both the said Order and Judgment ought *ex debito justitiae* to be unconditionally set aside pursuant to Order 14 Rule 11 of the Rules of the High Court, 1980.

5. Further to my depositions in paragraph 4 hereof, I verily believe that my existing Statement of Defence to the above suit filed by my former Solicitors, Messrs Rayner & Co. discloses ample triable issues to warrant a trial. A copy of the said Defence is now produced and shown to me marked as exhibit "CCH-3".

…

…

14. I further verily believe that if an Order/Judgment is defective and/or irregular, it is incumbent on the Plaintiffs to apply to this Honourable Court to have it set right. There is no obligation on my part as the 1st Defendant to do so.

> 15. But since the Plaintiffs are not taking any steps to rectify the said defective and/or irregular Order and Judgment but instead took execution proceedings based on the same in Application For Execution No. K36-08-96, I am now constrained to make this application. Accordingly, it is just and equitable that I should be granted an extension of time in terms of my Summons in Chambers to file this application. Otherwise, this Honourable Court would be condoning a defective and/or irregular judgment for execution by the Plaintiffs.
>
> 16. Wherefore I cannot be faulted for any delay in making this application nor can delay be made an issue by the Plaintiffs to defeat my application herein.

Obviously the attitude adopted by the appellant/1st defendant was that he was not obliged to explain for the delay and if even so he had explained it by virtue of the defect in obtaining the said judgment. That in my view is contrary to the principle expressed by the Court of Appeal in *Khor Cheng Wah's* case *(supra)*. And accepting as the explanation what the appellant/1st defendant deposed to, the next question is whether it is reasonable in the circumstances.

This is how his Lordship Gopal Sri Ram JCA determined whether the explanation given in *Khor Cheng Wah's* case *(supra)* was reasonable when he said thus (at p. 229-230):

> In the present case, the explanation of the fourth defendant for the delay in making his explanation is, to summarize his affidavits, that he placed the conduct of his defence in the hands of a solicitor who did little to protect his client's interests.
>
> Is that a reasonable explanation? The learned judge did not think it was. And I agree with him. Undoubtedly, this court will not, whenever feasible, allow a client to suffer for the negligence of his solicitor: see, *Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 at p. 490, per VC George JCA. But there are limits to what may be done in the interests of justice. After all, justice is not only for a defaulting defendant: it is for the plaintiff as well. And at the end of the day, a careful examination of the facts and circumstances reveals that the fourth defendant did nothing to communicate with his solicitor at any earlier point in time to discover the state in which the litigation against him stood. Surely, it would be injustice to visit the consequences of his indifference upon the plaintiff's head.

In summary, what the appellant/1st defendant is saying is that he should not be blamed for the delay as the respondents/plaintiffs did not make the first move to rectify the defective said judgment. With respect, such an approach to take ignores completely the provision of O. 42 r. 13. Therein it is clear that it is the 'party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order

or judgment by him'. Hence, that aspect of the explanation of the appellant/1st defendant is without merit and not reasonable in the circumstances.

The other oblique reason given is that since the said judgment is defective there is no question of the appellant/1st defendant being required to explain for the delay. That in my view is inconsistent with the approach as laid down by the Court of Appeal in *Khor Cheng Wah's* case *(supra)*.

Thus, the nett effect is that there was no explanation given by the appellant/1st defendant for the delay of about 15 months after the service of the said judgment on him. And even if there is, I find it is not reasonable in the circumstances. Accordingly, I find no reason to exercise my discretion to allow an extension of time for the appellant/1st defendant to file his application to set aside the said judgment.

Conclusion

In view of the finding that I have come to hereinabove I do not think it is necessary for me to deal with the other points raised or consider the other orders prayed for. And for the above reasons I therefore dismiss this appeal with costs to be taxed unless agreed.